been held that when purchaser in consideration of being allowed to vend a certain article for one firm agrees not to handle any similar goods for any other firm such agreement is valid and binding. *Standard Fireproofing Co.* v. *St. Louis, etc., Co.*, 177 Mo. 559; *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454. There is a line of cases closely analagous, nearly identical, with the principal case, in which the contract of the purchaser not to sell certain articles at a different or less price than that agreed upon, has been held valid. *Walsh* v. *Dwight*, 58 N. Y. Supp 91; *Park & Sons Co.* v. *Nat'l. Druggists' Assn.*, 175 N. Y. 1; *Garst* v. *Harris*, 177 Mass. 72. The rule that contracts embodying a restraint of trade are valid where they are reasonable, and essential to protect one of the parties in the enjoyment of the legal fruits of a lawful contract, seems well supported by authority. In each case, however, the validity of the particular restraint rests upon its reasonableness in the light of the peculiar facts of the case at bar and it is here that while recognizing the same rule of law equally able courts may reach entirely different conclusions.

SALES—WAIVER OF WARRANTY.—The defendant to an action for breach of contract for failure to accept certain shipments of corn, sought recoupment because of breach of warranty in the condition of corn received in prior shipments under the same contract. Defendant had used the inferior corn with knowledge of the defect. *Held*: That since the defendant, the purchaser, knew that the corn was not of the quality contracted for, and accepted the same, such acceptance was a waiver of the warranty. *Henderson Elevator Co.* v. *Northern Georgia Milling Co.* (1906), — Ga. —, 55 S. E. Rep. 50.

The case is of interest as laying down the rather startling proposition that acceptance and use of goods by the vendee with knowledge that they do not conform to the warranty given by the vendor, waives the warranty. The decision in the principal case finds authority in part at least in the provisions of the Civil Code of Georgia in respect to waiver of warranty, but it can hardly be said that the decision in this case announces the rule supported by the weight of authority. It is perhaps a rule of universal recognition that acceptance of goods in ignorance of defects, unless duty of examination is imposed does not constitute a waiver of the warranty. *Thomas* v. *Simpson*, 80 N. C. 4. All courts seem further to agree that if notice of defect be given to vendor at time of acceptance the warranty is not waived. *Morse* v. *Moore*, 83 Me. 473. But mere knowledge at time of acceptance that the goods do not conform to the warranty ought not to deprive the vendee of his right to rely upon the warranty and to recover damages for its breach. *Gould* v. *Stein*, 149 Mass. 570; *Haltiwanger* v. *Tanner*, 103 Ga. 314; *Northwestern Cordage Co.* v. *Rice*, 5 N. D. 432; *Gilmore* v. *Williams* (Mass.), 38 N. E. 976. Nor does the fact of acceptance of the goods with such knowledge waive the warranty or affect the right to recover. Indeed it may be doubted whether in many cases the vendee has the right to return the goods: *Canning Co.* v. *Metzger*, 118 N. Y. 260; *Polhemus* v. *Heiman*, 45 Cal. 573; *Babcock* v. *Trice*, 18 Ill. 420; *Chase* v. *Evarts*, 19 N. Y. Sup. 987; *Long* v. *Armsby Co.*, 43 Mo. App. 253; *English* v. *Spokane Commission Co.*, 57 Fed. 451. The fact of acceptance may affect the right to rescind and is often strong evidence on the question of the existence of defects, but it cannot affect the

right to recover damages for breach of warranty: *Coal Co.* v. *Bradley,* 27 Pac. 454; *Weed* v. *Dyer,* 53 Ark. 155; BENJAMIN, SALES (Seventh Am. Edition), p. 961. Nor does it seem that the keeping and using of the goods with knowledge that they do not conform to the warranty, should operate as a waiver. *Lanson* v. *Aultman, etc., Co.,* 86 Wis, 281; *Taylor, etc., Co.* v. *Pumphrey* (Texas), 32 S. W. 225; *Breen* v. *Moran* (Minn), 53 N. W. 755; *Best* v. *Flint,* 58 Vt. 543; *Dayton* v. *Hoaglund,* 39 Oh. St. 671; BENJAMIN, SALES (Seventh American Edition), p. 960. It would seem that the vendee has a right to rely upon the warranty given by the vendor and can accept the goods, in reliance upon the warranty, without examination, and if he discovers that the goods do not conform to the warranty he is under no duty to return them but can keep them and sue for the damages or set up counter claim for damage resulting from the breach.

SPECIFIC PERFORMANCE—CONTRACTS TO DEVISE—ANTENUPTIAL CONTRACT—ENFORCEMENT.—Action for specific performance of an alleged contract between plaintiff and his father, the testator. The controversy arises not from a defect in the will, but from an antenuptial contract whereby testator stipulated as follows: "and the said Jas. Phalen and C. S. his wife do farther respectively covenant and agree that they will make no distinction between their children as regards the proportion of their estates coming to each, etc." The theory of the present case is that testator left the plaintiff's equal share, not absolutely to him, but changed it by Codicil 7, whereby testator directed that the portion of his residuary estate bequeathed to his son the plaintiff should be held in trust and upon his death go to his heirs. In the opinion delivered by WERNER, J., (three judges concurring and three dissenting) it was *held,* (1) That a court of equity will in the exercise of sound discretion consider whether, under the circumstances, it will be equitable and just to compel the trustee, holding the property in trust to turn it over to the son. (2) That the antenuptial contract which was made because of the son's coming marriage was supported by sufficient consideration to uphold specific performance. *Phalen* v. *United States Trust Co. of New York et al* (1906), — N. Y. —, 78 N. E. Rep. 943.

The holding is sustained by the weight of authority, as to the right of the court to grant specific performance, in *King* v. *Hamilton,* 29 U. S. (4 Pet.) 311; *McCabe* v. *Crosier,* 69 Ill. 501; *Peris* v. *Haley,* 61 Mo. 453; *Murdfeldt* v. *N. Y., W. S. & B. Ry.,* 404. (2) That marriage is a good consideration, see *Chichester* v. *Cobb,* (Eng.) 14 L. T. N. S. 433; *Thompson* v. *Thompson,* 17 Ohio St. 649; *Barr* v. *Hill,* Add. (Pa.) 276; *Caines* v. *Jones,* 5 Yerg. (Tenn.) 249; *Eppes* v. *Randolph,* 2 Call (Va.) 125; *Wall* v. *Scales,* 1 Dev. Eq. N. C. 476; *Keays* v. *Gilmore,* Irish R. 8 Eq. 296, and SCHOULER, DOM. REL. § 178, holding that "the promise of a third party may be for the wife's benefit; or it may be for the mutual benefit of the married parties, and enforceable accordingly."

STREET RAILWAYS—LIABILITY FOR COST OF PAVING SPACE BETWEEN RAILS.—Plaintiff city after taking the proper preliminary steps was engaged in paving a street. Notice to pave its portion of the street was given the defend-